IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-569
No. 76-570

NEW YORK SHIPPING ASSOCIATION, INC.
and
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *Petitioners,*
v.
NATIONAL LABOR RELATIONS BOARD, *Respondent,*
and
TWIN EXPRESS, INC.,
CONSOLIDATED EXPRESS, INC.,
and
TRUCK DRIVERS UNION LOCAL 807,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Intervenor-Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR TWIN EXPRESS, INC. IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (A79-A96) [1] is reported at 537 F.2d 716. The Board's decision and

[1] References preceded by an "A" are to pages of the 174 page Appendix filed by the Petitioners with this Court. References preceded by a "JA" are to pages of the two-volume joint appendix

order (A58-A78), together with the decision of the Administrative Law Judge (A1-A57), are reported at 221 N.L.R.B. No. 144. The opinion of the District Court (per Judge Lacey) awarding Section 10(1) [2] injunctive relief on behalf of Consolidated Express, Inc. (CEI) is reported at 364 F. Supp. 205 (D.N.J.), aff'd without opinion, 491 F. 2d 748 (3rd Cir. 1973), sub nom., *Balicer* v. *International Longshoremen's Assn. and New York Shipping Assn., Inc. (Consolidated Express, Inc.)*. The opinion of the same District Court awarding 10(1) injunctive relief on behalf of Twin Express, Inc. (TEI) is reported at 86 L.R.R.M. 2559 (D. N.J. 1974), sub nom., *Balicer* v. *International Longshoremen's Assn. and New York Shipping Assn., Inc. (Twin Express, Inc.)*.

JURISDICTION

The decision of the Court of Appeals was issued on June 29, 1976. A Petition for Rehearing With A Suggestion For Rehearing *En Banc*, timely filed, was denied by the Court of Appeals on August 6, 1976 (A97-A98), and judgment was entered on September 9, 1976 (A99-A101). The petitions for a writ of certiorari were filed on October 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the Rules on Containers, adopted

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which was filed with the court below and which the Board has since also lodged with this Court. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

[2] 29 U.S.C. § 160(1).

and jointly enforced by the International Longshoremen's Association (ILA) and the New York Shipping Association (NYSA), violated Sections 8(b) (4) (ii) (B) and 8(e) of the National Labor Relations Act (the Act) because such Rules were designed to acquire for ILA pier-side members all container consolidation work which had previously and traditionally been performed by non-ILA (but otherwise unionized) employees of off-pier consolidators such as Twin Express, Inc. (TEI) and Consolidated Express, Inc. (CEI).

2. Whether the Board's decision was consistent with this Court's decision in *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612 (1967).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73, Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in both petitions at pp. 3-4.

STATEMENT

The dispositive issue is whether the NYSA and the ILA, by enforcing their jointly adopted "rules on containers," unlawfully sought to obtain for ILA members certain container consolidation work previously and traditionally performed by the Teamster employees of various off-pier consolidators. Involving disputed questions of ultimate fact, this is precisely the kind of issue which is, and should be, committed to the Board's judgment.[3]

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[3] With only minor exception, the entire record in this case was developed before Judge Lacey in the two district court 10(1) injunction proceedings, *supra*. Both the ALJ and the Board relied only on that record in reaching their respective findings and conclusions.

A. The Parties

TEI and CEI are two of many off-pier consolidators, formally known before the Federal Maritime Commission as "non-vessel-owning common carriers" (NVOCCs), who are in the container consolidation business around the Port of New York and other ports throughout the country (A59; JA 711a). Their principal function is to receive from shippers small shipments—known in the trade as "less-than-container-load" (LCL) or "less-than-trailer-load" (LTL) shipments—which they then consolidate into large containers (35 and 40-feet in length) for immediate loading and transport on ocean going vessels. TEI opened its business in 1967 (A60; JA 711a). CEI has been in business under its present name since 1965; prior to that, it was operated under the name of Valencia Baxt Express since 1949 (A60; JA 768a, 785a-786a). TEI's employees are represented by IBT Local 707 which entered an *amicus* appearance in the court below; and CEI's employees are represented by IBT Local 807 which has participated as an intervenor in this litigation since its early stages (A60; A80). Both TEI and CEI are involved principally in the Puerto Rican trade (A59-A60; JA 711a-712a).

NYSA is an association of various employers, primarily ocean carriers and stevedoring companies, involved in the operations of the New York Port. Prior to 1971, the ocean carriers comprised NYSA's only voting members. From mid-1971 on, however, these carriers "turned the Association over to the stevedoring companies as the voting members" (A61; JA 897a). NYSA, and from 1970 onward, CONASA (the Council of North American Shipping Associates), conducted the collective bargaining on behalf of the Port

employers, with the ILA representing the longshoremen. Today the bargaining between NYSA and ILA results in a contract that covers all port employers and longshoremen from Boston to Hampton Roads, Virginia (A61; A3).[4]

B. Contentions of the Parties

1. *TEI and CEI*

In February, 1973, NYSA and ILA entered into an agreement which was known as the Dublin Supplement and which was designed to assure compliance with certain container rules under which NYSA agreed not to transport any containers from local off-pier consolidators (such as TEI and CEI) unless the containers were first unpacked ("stripped") and repacked ("stuffed") by ILA members. Enforcement of this Supplement threatened to destroy the businesses of TEI and CEI, as well as all other similar off-pier consolidators around the New York Port. As District Judge Lacey expressly found when, pursuant to Sections 8(b)(4), 8(e) and 10(l) of the Act, he enjoined enforcement of the Supplement and the rules generally, if such enforcement were allowed to continue, CEI "will have to cease operations" (364 F. Supp. at 227), and TEI "will soon be forced out of business" (86 LRRM at 2564). NYSA/ILA seek to excuse these consequences by contending that the ILA is merely seeking to preserve its work. But TEI and CEI believe that the object of the rules was not to preserve the ILA's work, but to take over work traditionally performed by the off-pier consolidation industry. In addition, TEI and CEI believe

[4] In their petitions herein, both the ILA (at p. 7) and the NYSA (at p. 13) assert that the container rules here in issue apply "from Maine to Texas".

that, to the extent ILA ever arguably had a claim to off-pier container consolidation work prior to 1959, that claim was negotiated away in the 1959 NYSA/ILA collective bargaining agreement. In return for regularly continuing royalty payments, the amount of which was set by an arbitral panel in 1960,[5] the ILA, in Section 8(a) of the 1959 agreement, expressly contracted away its claim by agreeing that, "[a]ny employer shall have the right to use any and all types of containers without restriction or stripping by the union" (A62, A71; JA 208a-209a, 329a-384a).

Thereafter—so Judge Lacey, the Board, intervenors and Judge Ordman all agree—thousands of off-pier LTL or LCL consolidated containers passed across the pier and on board vessels without any rehandling by ILA labor (A72; A28-A30, A43, 364 F. Supp. at 226, 86 LRRM at 2563). In the case of the thousands of TEI and CEI containers, the evidence indisputably established, as the Board expressly found, that "with few exceptions"—and those generally "coinciding with contract negotiations" —the ILA regularly "loaded such containers without stripping and restuffing" (A72; *id.*).

Even the pervasive contract amendments and totally new rules adopted by NYSA/ILA in 1969 and 1970

[5] In its petition herein (at p. 5), the ILA characterized these continuing royalty payments as "modest". The record contains no information as to the precise amounts of these payments. But the record contains an indication that in 1972 some 3,300 unemployed longshoremen were each receiving $16,500 annually (JA 1023a). Moreover, the record also shows that, between 1965 and 1972, some $100 million was received from the NYSA and spent by the ILA in Guaranteed Annual Income (GAI) payments to ILA members (JA 285a). Whatever claim the ILA may *arguendo* have had to off-pier consolidation work prior to the 1959 contract, therefore, has been—and continues to be—compensated for more than amply.

did not impede the continuing passage of these thousands of containers directly on board vessels free from any ILA interference (A63-66, A72). It was only after adoption of the Dublin Supplement in 1973, following an apparently amicable NYSA/ILA meeting in Dublin, Ireland, that the rules, as so supplemented, were first applied. The results, of course, were draconian. No containers were supplied by the steamship lines then in the trade (viz., Sea-Land, Seatrain and TTT) to the off-pier consolidators, and none of the lines would accept a container that was consolidated off-pier—even if it was a so-called "foreign" container leased by TEI from a railroad or leasing company.[6] In short, as a direct consequence of the Dublin Supplement, all local off-pier consolidation work for all practical purposes had to cease and be taken over exclusively by ILA labor on pier. For otherwise the ocean carriers would simply not accept any container locally packed off-pier, unless it were first stripped and restuffed by on-pier ILA labor; and this "make-work" process necessarily rendered off-pier consolidation at least superfluous and, in fact, doubly expensive.

2. *NYSA and ILA*

NYSA and ILA, on the other hand, argue that, despite the aforequoted terms of Section 8(a) of the 1959 agreement, the ILA obtained the right in the 1959

[6] Both ILA (pp. 7 and 8 of petition) and NYSA (pp. 4, 5 and 8 of petition) repeatedly imply that their rules applied only to containers supplied by the carriers. But the evidence showed, and the Board expressly so found, that the rules applied also to "foreign" containers (A66, A70; JA 719a-721a, and para. 3(f) on JA 250a). The practical effect of this extended application, of course, was to ensure that no local consolidation work could be performed with any containers off-pier and that all such consolidation work could thenceforth be performed only by on-pier ILA labor.

agreement to strip and restuff all LTL and LCL containers which were packed by off-pier consolidators within the Port of Greater New York or, more specifically, within a 50-mile radius of the New York Port. NYSA/ILA further suggest that from 1959 forward these rules were regularly enforced but that, as a result of certain enforcement difficulties that were encountered, the rules were amended in the 1968 agreement (adopted in early 1969), later again amended in 1970, and still further amended by the Dublin Supplement in 1973 to eliminate the enforcement difficulties and to assure that all local LTL and LCL containers were packed on pier by ILA labor. Moreover, if they were packed off-pier, then the ILA could either "make work" by stripping and restuffing the containers once they arrived on the pier or, as the 1970 agreement provided, the ILA could assess any carrier which accepted such containers without the "make-work" a "liquidated damage" penalty of $1,000 per container. NYSA/ILA, however, do not dispute the fact that thousands of such containers year after year—from the 1950s up to the time of the Dublin Supplement—regularly passed over the piers unimpeded and free from any "liquidated damage" penalty, but contend that these were all due to the enforcement difficulties.[7] Accordingly, so NYSA/ILA now argue, enforcing the Dublin Supplement does no more than preserve work to which ILA members

[7] The ILA contends (p. 8 of petition), as does NYSA (p. 9, note 8 of petition), that these containers avoided the rules because of the "acquiescence or connivance of the major ocean carriers." But the tally sheets and other documents of record herein clearly establish that, if nothing else, ILA members were at least totally aware of the fact of these containers and their regular unimpeded passage through the Port (JA 288a, 290a, 299a, 306a, 456a, 457a, 470a, etc.).

were always, and are still, entitled. And as such, the NYSA/ILA activities are protected under the *National Woodwork* exception to the secondary boycott provisions of the Act—irrespective, so it is argued, of the terminal effect this conclusion will have on the off-pier consolidation industry around New York and other Ports.

C. The Board's Conclusions and Order

On these facts, the Board concluded that CEI and TEI "have traditionally been engaged in the work of stuffing and stripping containers such as are here in controversy" (A69), that with only "few exceptions, ILA has loaded such containers without stripping and restuffing" (A72), and that any on-pier stripping and stuffing work "performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by CEI and TEI at their own off-pier premises" (A69).[8] The Board further concluded that even if the ILA could

[8] Despite ILA assertions, the record contains almost no evidence as to any tradition of ILA labor having stripped or stuffed containers on pier. This lacuna was recognized, and in part explained, by ALJ Ordman (A36, n. 8). To the extent that such work was done, however, it was with respect only to LTL shipments that were made directly to the ocean carriers for consolidation by them rather than by off-pier consolidators. In any event, the record does establish that it was not until February, 1973 that Seatrain had any on-pier facilities to do any stripping and stuffing work (JA 1029a-1030a, 1035a-1036a), and it was likewise not until that time that TTT had anything other than "a small facility" which was adequate "only . . . to stuff their own cargo" (JA 717a). Indeed, it was apparently not until November, 1972 that NYSA/ILA even decided to establish on-pier consolidation stations (JA 498a, 501a-502a, 506a)—obviously only in anticipation of capturing the off-pier consolidation work through the enforcement of new rules such as those that were adopted a few weeks later in Dublin.

establish its own tradition of stripping and stuffing, nevertheless "[i]t does not fall within ILA's traditional role to engage in make-work measures by insisting on stripping and stuffing cargo merely because that cargo was originally containerized by nonunit personnel" (A70). And otherwise, the ILA's demands could only be met if the work "traditionally . . . performed by employees in other units" were now to be "taken over and performed at the pier by longshoremen represented by ILA" (*Id.*). All of these circumstances, combined with the additional fact that NYSA/ILA were now applying their rules also to encompass "foreign" containers, moved the Board to conclude that the ILA was not seeking simply to preserve its traditional work but to acquire work unlawfully. Finally, the Board also held that whatever claim the ILA might arguably have had to the work prior to 1959 was, in any case, abandoned by the ILA in the 1959 Agreement in return for the *quid pro quo* of royalty payments.[9] On the basis of all of these conclusions, the Board held that NYSA/ILA violated Sections 8(b)(4) and 8(e) of the Act and that the work preservation exception of *National Woodwork* was inapplicable.

D. The Decision of the Court of Appeals

A majority of the court below held, as did the Board, that the NYSA/ILA activities were not protected within *National Woodwork* and, accordingly, that the NYSA/ILA activities violated Sections 8(b)(4) and 8(e) of the Act because "the ILA's real object was to obtain . . . work traditionally performed by employees not represented by ILA" (A89-A91).

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[9] See note 5 *supra* and accompanying text.

ARGUMENT

1. In *National Woodwork, supra*, p. 644, this Court held that whether otherwise unlawful secondary activities are rendered lawful on grounds that they seek merely to preserve work in the face of technological change depends upon "whether, *under all the surrounding circumstances* [footnote omitted], the Union's objective was preservation of work for [the unit] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere" (emphasis added). If the objective is the latter, the activities are secondary and unlawful. In the face of the facts in this case, we think there can be no question but that the Board's conclusion is proper and supported by substantial evidence. For as we shall next show, this case does not conflict with—but properly applies—the rule of *National Woodwork*.

Rather than limiting its focus, as did dissenting Circuit Judge Feinberg and ALJ Ordman below, only to the work done by the ILA, the Board in this instance focused, as *National Woodwork* requires, on "all the surrounding circumstances." Thus, in focusing on the ILA and its work, the Board found that "[t]he traditional work [of] the longshoremen represented by ILA has been to load and unload ships" and that "stripping and stuffing work [was] performed by longshoremen as an incident of loading and unloading ships" and "when necessary to perform their loading and unloading work" (A69). Certainly these findings are supported by substantial evidence on the record. Equally supported, moreover, is the Board's critically important additional finding that "[t]he limited stripping and restuffing performed by ILA at times coinciding with contract negotiations re-

veals, at most, attempts on the part of ILA to bolster its bargaining position" (A72).

While ILA thus performed consolidation merely as an incident to its traditional work or as a means to gain a bargaining chip for use in its negotiations with NYSA, consolidation is the very life blood of TEI and CEI. Focusing on this as another of "all the surrounding circumstances", the Board arrived at two further findings equally supported by substantial evidence: (1) "[t]he consolidators generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their own customers who have goods to ship" (A69); and (2) TEI and CEI "have traditionally been engaged in the work of stuffing and stripping containers such as are here in controversy" (*Id.*). These findings, we submit, were probative in demonstrating that ILA was not using the container rules as a "shield" for work preservation, but as a "sword" for work acquisition (*National Woodwork, supra,* p. 630); and the Board was clearly entitled to weigh these critical factors as part of "all the surrounding circumstances."

Perhaps the most revealing evidence supporting the Board's conclusion that the ILA was in fact trying to take over work performed by CEI and TEI was paragraph 3(f) of the rules, which prevented CEI and TEI from using "foreign" containers—those not supplied by NYSA members but leased by off-pier consolidators from railroads or leasing companies (JA 70a-71a). For there simply can be no question but that the ILA had no tradition of ever having consolidated any but carrier-supplied containers. Indeed, this may well be the very case implicitly condemned by Justice Brennan when, in *National Woodwork, supra,* p. 630, he spoke

of a union objective "to reach out to monopolize jobs." Cf. *Allen Bradley Co.* v. *Local Union No. 3, IBEW,* 325 U.S. 797 (1945). For it cannot be gainsaid but that this was precisely the ILA's objective here.

Finally Section 8(a) of the 1959 agreement certainly provided the Board with a reasonable basis for its conclusion that the ILA had, in any event, surrendered any claim that it might have had to the stuffing and stripping work in controversy (JA 91a). The record as a whole, therefore, contained more than substantial evidence to support the conclusion reached by both the Board and the court below that the rules did not have the lawful purpose of work preservation, but that their real object was to obtain work traditionally performed by employees not represented by ILA.[10]

2. NYSA/ILA advance dark suggestions of potentially disastrous consequences in the event the Board's decision is not reversed. But the fact of the matter is that there will hardly be any effect at all on present

[10] Petitioners and dissenting Circuit Judge Feinberg erroneously accused the Board of "focusing" only on the work done by CEI and TEI while ignoring the work done by the ILA. It is clear, however, that the Board gave careful consideration to "all of the surrounding circumstances"—not just the work customarily done by CEI and TEI, but the work actually done by the ILA and the specific provisions of the NYSA/ILA contracts relating to this work. Thus, rather than focusing on any one factor, the Board, as it should, gave ample attention to all factors and all circumstances. In this regard, moreover, it was clearly appropriate for the Board to take into consideration the fact that the consolidators not only generated their work themselves but that they traditionally performed the work of stuffing and stripping containers. For contrary to petitioners' contentions, these facts are clearly relevant in demonstrating that the ILA's true object was not to preserve its own work, but to encroach upon work generated and performed by others.

longshore work. Prior to the 1973 Dublin Supplement, virtually all the containers of all the off-pier consolidators passed over the pier without ILA interference. Shortly after Dublin, Judge Lacey issued his two decisions enjoining NYSA/ILA from enforcing the rules at least *vis-a-vis* TEI and CEI. Nor, so far as we are aware, are NYSA/ILA at the present time enforcing the rules *vis-a-vis* any off-pier consolidator. The Court of Appeal's decision, therefore will have virtually no practical effect on present longshore work. More importantly, that decision will have the highly beneficial effect of assuring that precisely the same conditions will exist "from Maine to Texas"[11] as exist now in every West Coast port. For only a short time prior to its decision in this case, the Board held unlawful an almost identical work acquisition effort by the West Coast longshoremen. There too the Board held that the longshore effort was not within the protective ambit of *National Woodwork* and, accordingly, violated 8(b)(4) and 8(e) of the Act. *ILWU, Locals 13 and 63 (California Cartage Co., Inc.)*, 208 NLRB 994 (1974). The Board's decision was enforced *per curiam* without opinion by the District of Columbia Court of Appeals, sub nom., *Pacific Maritime Association* v. *N.L.R.B.*, 515 F.2d 1018 (D.C. Cir. 1975), and this Court denied certiorari only as recently as last March in No. 75-684 (424 U.S. 942). A denial of certiorari here, therefore, will assure uniformity throughout all the ports of this nation.

3. NYSA/ILA reliance on *Intercontinental Container Transport Corp.* v. *NYSA and ILA*, 426 F.2d 884 (2d Cir. 1970) is misplaced. In their Petition to

[11] See note 4, *supra*.

the court below for Rehearing with Suggestion *En Banc*, NYSA/ILA raised, as here, the same issue concerning alleged inconsistency of holdings within the Second Circuit. Presumably that argument should have been far more persuasive to the Second Circuit than here. Yet, the very fact that the Second Circuit denied rehearing and rehearing *en banc* demonstrates that, responsive through that Court is to labor and labor union concerns, it saw no inconsistency between the decisions. And, indeed, there is none. For *ICTC* was not a labor case but an antitrust action, and the parties to that litigation did not once dispute whether the objective of the rules was that of work preservation. The consolidator (ICTC) opted to concede a work preservation objective but argued an antitrust violation nevertheless. Given such a litigation context, it can hardly be suggested that *ICTC* was a "test" (ILA petition at p. 7) of the validity of the rules under the Labor Act.[12] In addition, the doctrine of primary jurisdiction would require that any holding as to whether the container rules have the objective of work preservation must be made in the first instance by the Labor Board, not by the Court of Appeals. *Far East Conference* v. *United States*, 342 U.S. 570 (1951); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) and cases cited therein. But even if, contrary to fact, the instant decision conflicted with *ICTC*, an intra-circuit conflict is not ordinarily a valid ground for granting certiorari. Stern

[12] Moreover, *ICTC* arose long before the Dublin Supplement—the negotiation and enforcement of which most probably reflected the ascendancy within NYSA of the stevedore companies which, because they actually consolidate, have a greater interest in driving consolidation work to the piers (rather than simply having the ILA continue to collect royalties).

and Gressman, *Supreme Court Practice* § 4.6 (B.N.A. Inc. 1969)

4. NYSA/ILA reliance on *Pittston Stevedoring Corp.* v. *Dellaventura*, —F.2d—(2d Cir. 1976), *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264 (1st Cir. 1976), and *Leathers Best, Inc.* v. *S. S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971) is also misplaced. Whatever compensation ILA members might be entitled to under legislation enacted only for their benefit—the Longshoremen and Harbor Workers Compensation Act (33 U.S.C. 901, *et seq.*)—hardly determines whether, as here, the ILA should be able to destroy the off-pier consolidation industry in an effort to monopolize job tasks for its own members. And the determination in *Leathers Best* as to whether a container is a "package" for purposes of the Carriage of Goods by Sea Act (46 U.S.C. 1300 *et seq.*) is even less related to the issues here. In short, whether or not the language fits, the shoe certainly does not.

5. Finally, ILA's reliance (at pp. 13-14 of its petition) on a number of other work preservation cases is unavailing. As Justice Brennan observed in *National Woodwork, supra,* p. 645, determining the validity of a work preservation claim "will not always be a simple test to apply." The cases cited by ILA do nothing more than offer precedents—limited to the specific facts of those cases and, hence, not overly helpful here. But if previously decided cases are to be deemed important, we would look to Justice (then Judge) Stewart's decision in *N.L.R.B.* v. *Local 11, United Brotherhood of Carpenters,* 242 F.2d 932 (6th Cir. 1957) and also to the decision in *Joliet Contractors Association* v. *N.L.R.B.*, 202 F.2d 606 (7th Cir., 1953), cert. den., 346 U.S. 824. Both of these cases

were cited with approval by Justice Brennan in his decision in *National Woodwork* (*supra,* p. 645, n. 1), and both would plainly support the result reached here by the Board and the court below.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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